

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 ANTHONY BRANDEL and JAMES
11 WARRAS,

12 Defendants.

Case No. 2:13-cr-439-KJD-VCF

OPINION, ORDER on RESTITUTION and
FINAL ORDER of FORFEITURE

13
14 Presently before the Court is the Government's Motion for Forfeiture as to James Warras
15 (#296). Defendant Warras filed a response in opposition (#311) to which the Government replied
16 (#322). Also before the Court is the Government's Motion for Forfeiture as to Anthony Brandel
17 (#298). Defendant Brandel filed a response in opposition (#314) to which the Government
18 replied (#323). Also before the Court is the Government's Motion in Support of Restitution
19 (#297). Defendant Warras filed a response in opposition (#312) as did Defendant Brandel (#315)
20 to which the Government replied (#321).¹ Defendant Brandel filed a Supplemental Response
21 (#365) to the Government's motions which the Government replied to (#367).

22 The Government also moved to Strike Government's Statement in Closing Argument
23 Based on a Mathematical Miscalculation of Exhibit K (#366).

24 Also before the Court is Defendant Brandel's late filed Motion to Adjust Restitution and
25

26 ¹ After the January 16, 2018 hearing on restitution and forfeiture, the Court entered a minute order (#368)
27 which granted the motions for forfeiture and restitution. Further, the Court disposed of the Supplemental Response
28 (#365) of Brandel, wherein he essentially argued that he should not only not be liable for restitution or forfeiture but
that he was actually innocent of the charges for which he was convicted. However, the Court denied the Supplement
at the hearing as untimely and then denied it by minute order on the merits. Further, the Court had previously granted
a motion in limine by the Government which forbade the Defendants from re-arguing their actual innocence at the
restitution and forfeiture hearing.

1 Forfeiture (#371). The Government filed a response in opposition (#373).

2 Also before the Court is the Government's Motion to Add GW's Loss to Restitution and
3 to Replace EG with JE, as the actual victim of the monetary loss (#372). Defendant James
4 Warras filed a response in opposition (#375) to which the Government replied (#376/379).
5 Defendant Brandel filed a late opposition (#381).² The Government also filed a Motion for Entry
6 of Opinion, Restitution Order and Final Order of Forfeiture (#374). Defendant Warras filed a
7 response in opposition (#377) to which the Government replied (#378/380).

8 **I. PROCEDURAL HISTORY and FACTUAL FINDINGS**

9 A jury found Anthony Brandel guilty of Counts 1, 3, 4, 6, 7, 9-13, 15-18, 21-24 of the
10 Indictment, and Defendant James Warras guilty of Counts 1, 3-5, 11-13, 15-17, 19, and 23-24 of
11 the Indictment. See Minutes of Jury Trial, ECF No. 208; Jury Verdict, ECF No. 215. The Court
12 found that Anthony Brandel shall pay the *in personam* criminal forfeiture money judgment of
13 \$4,920,000 pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2); Title 18, United States Code, Section
14 981(a)(1)(C) with Title 28, United States Code, Section 2461(c); and Title 21, United States
15 Code, Section 853(p). Indictment, ECF No. 1; Minutes of Jury Trial, ECF No. 208; Jury Verdict,
16 ECF No. 215; Amended Preliminary Order of Forfeiture, ECF No. 237. The Court found that
17 James Warras shall pay the *in personam* criminal forfeiture money judgment of \$4,920,000
18 pursuant to Fed. R. Crim. P. 32.2(b)(1) and (2); Title 18, United States Code, Section
19 981(a)(1)(C) with Title 28, United States Code, Section 2461(c); and Title 21, United States
20 Code, Section 853(p). Indictment, ECF No. 1; Minutes of Jury Trial, ECF No. 208; Jury Verdict,
21 ECF No. 215; Preliminary Order of Forfeiture, ECF No. 276.

22 On January 16, 2018, the Court held the evidentiary hearing and oral argument for the
23 sentencing on restitution and forfeiture, with testimony from Federal Bureau of Investigation
24 (FBI) Special Agent Gene Tierney and FBI Forensic Account Gary Daniel Marsh and admitted
25 exhibits that the Court found relevant and reliable (ECF Nos. 368, 369). The Court finds the
26 rules of evidence do not apply and relevant and reliable hearsay can be used in restitution and
27 forfeiture. See U.S. Sentencing Guidelines (U.S.S.G.) § 6A1.3(a); Fed. R. Crim. P.

28 ² The Government filed a Motion to Strike (#382/383) Brandel's late opposition.

32.2(b)(1)(B); United States v. Newman, 659 F.3d 1235, 1245 (9th Cir. 2011), *cert. denied*, 566 U.S. 915 (2012), *abrogated on other grounds*, Honeycutt v. United States, 137 S. Ct. 1626, 1632 and 1635 (2017); United States v. Huckins, 53 F.3d 276, 279 (9th Cir. 1995); United States v. Petty, 982 F.2d 1365, 1369 (9th Cir.), *amended*, 992 F.2d 1015 (9th Cir. 1993); United States v. Riley, 143 F.3d 1289, 1292 (9th Cir. 1998); United States v. Grice, 319 F.3d 1174, 1178-79 (9th Cir.); United States v. Brock-Davis, 504 F.3d 991, 999 (9th Cir. 2007); In re Her Majesty the Queen in Right of Canada, 785 F.3d 1273, 1276 (9th Cir. 2015).

The Court finds the guilt phase of the government's witnesses' testimonies and the trial admitted exhibits are relevant and reliable. The Court finds the sentencing witnesses and exhibits are relevant and reliable evidence: A, A-1, A-1-a, A-1-b, A-1-c, A-1-d, A-1-e, A-1-f, A-1-g, A-1-h, B, C, C-1, D, D-2, E, E-1, E-2, F, F-1, F-2, F-3, F-4, F-4-a, F-4-b, F-4-c, F-4-d, F-4-e, F-4-f, F-5, F-6, F-7, G, G-1, G-2, G-2-a, G-2-b, G-2-c, G-2-d, G-2-e, G-2-f, G-2-g, G-2-h, G-7, G-7-a, G-7-b, H, H-1, H-1-a, H-1-b, H-1-c, H-1-d, H-1-e, H-1-f, H-1-g, H-1-h, 801, 802, 803, 805, I, J, K, M, and N. The Court finds the statements of the SEC attorneys explaining how they obtained the information, made the exhibits, and only Brandel's statements that are against his interest in Ex. M are relevant and reliable evidence.

II RESTITUTION

A. The victims' actual losses are \$6,475,000 under the Mandatory Victim Restitution Act.

The Court finds the following are victims with actual losses of Brandel's and Warras's wire fraud scheme and conspiracy to commit wire fraud: GL lost \$225,000, N&NA lost \$350,000, JS lost \$300,000, JH lost \$150,000, EK lost \$430,000, MB lost \$250,000, GD lost \$200,000, MK lost \$200,000, TF lost \$1,000,000, JA lost \$540,000, WB lost \$330,000, LB lost \$300,000, DM lost \$400,000, JE lost \$500,000, W&CG lost \$1,200,000, and GW lost \$100,000 because of Brandel's and Warras's criminally convicted conduct. The located victims' actual loss is \$6,475,000.³ Admitted exhibits at trial and at sentencing and testimony at trial and

³ This dollar amount is based on GW's loss of \$100,000. Having read and considered the Government's Motion to Add GW's Loss to Restitution and to Replace EG with JE, as the actual victim of the monetary loss (#372) and the oppositions and replies, the Court finds that a preponderance of the evidence supports the Government's

1 sentencing.

2 **B. The Mandatory Victim Restitution Act applies to this case.**

3 The Mandatory Victim Restitution Act (“MVRA”) requires a restitution order at
4 sentencing where defendants’ criminal conduct caused the victims’ losses, including offenses
5 committed by fraud or deceit. See 18 U.S.C. §§ 3663A(a)(1) and (c)(1)(A)(ii) and 3664(e) and
6 (f)(1)(A); United States v. Lo, 839 F.3d 777, 788-789 (9th Cir. 2016); United States v. Eyraud,
7 809 F.3d 462, 467 and 469 (9th Cir. 2015); United States v. Hymas, 780 F.3d 1285, 1293 n.4
8 (9th Cir. 2015); United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010); United States v.
9 Gossi, 608 F.3d 574, 578-79 (9th Cir. 2010); United States v. Peterson, 538 F.3d 1064, 1074-75
10 (9th Cir. 2008); United States v. De La Fuente, 353 F.3d 766, 769 (9th Cir. 2003). The Court
11 finds that since the jury found Brandel and Warras committed a scheme of wire fraud and
12 securities fraud and a conspiracy to commit a scheme of wire fraud and securities fraud, the
13 MVRA requires the Court order restitution to the victims.

14 **1. The Defendants are jointly and severally liable for restitution of \$6,475,000.**

15 The Court must impose the full amount of restitution for the identifiable victims’
16 losses without consideration of the defendant’s economic circumstances (18 U.S.C. §
17 3664(f)(1)(A)), or when more than one defendant contributed to the victims’ losses, may
18 apportion the restitution amounts among the defendants to reflect their level of contribution to
19 the victims’ losses and the economic circumstances of each defendant (18 U.S.C. § 3664(h)), and
20 has discretion to decide the monthly payment towards the restitution (18 U.S.C. § 3664(f)(3)(B)).
21 See 18 U.S.C. § 3664(f)(1)(A), (f)(3)(B), and (h); United States v. Hankins, 858 F.3d 1273, 1276
22 (9th Cir. 2017); Grice, 319 F.3d at 1177; United States v. Matsumaru, 244 F.3d 1092, 1108-09
23 (9th Cir. 2001); United States v. Dubose, 146 F.3d 1141, 1148 (9th Cir. 1998), *as amended on*
24 *denial of reh’g* (Aug. 31, 1998); United States v. Hymas, 582 F. App’x, 770, 770-71 (9th Cir.
25 2014); United States v. Reed, 84 F. App’x 983, 987 (9th Cir. 2004).

26 When the Court asked the defendants if they wanted apportionment at sentencing
27 regarding restitution, they wanted joint and several liability rejecting apportionment. Even if the

28 _____
motion and the motion is **GRANTED**.

1 defendants were to request apportionment, and it certainly appears that Warras has requested
2 apportionment, the Court has discretion to apportion the restitution amounts or not to apportion
3 and to order joint and several liability. 18 U.S.C. § 3664(h); United States v. Booth, 309 F.3d
4 566, 575-76 (9th Cir. 2002); Hymas, 582 F. App'x at 770-71.

5 The Court may deny apportionment when the defendants are blameworthy
6 regarding their convicted crimes, play essential roles in the scheme to commit wire fraud and
7 securities fraud and conspiracy to commit such scheme of fraud, have culpability, and are
8 partially responsible for the victims' losses. Id. The Court may also deny apportionment because
9 restitution is to make the victims whole, not punish the defendants. Hymas, 582 F. App'x at 771;
10 Newman, 659 F.3d at 1241, *abrogated on other grounds*, Honeycutt, 137 S. Ct. at 1632 and
11 1635; Hunter, 618 F.3d at 1064. The Court finds the defendants are jointly and severally liable
12 for restitution of \$6,475,000.

13 **2. Preponderance of the Evidence is the Standard of Proof for Restitution.**

14 “The standard of proof for restitution proceedings is preponderance of the
15 evidence as opposed to the standard of clear and convincing evidence required of a sentencing
16 enhancement with a disproportionate impact.” Hymas, 780 F.3d at 1293 n.4; 18 U.S.C. §§
17 3663A(a)(1) and (c)(1)(A)(ii) and 3664(e) and (f)(1)(A); In re Her Majesty the Queen in Right of
18 Canada, 785 F.3d at 1276; Peterson, 538 F.3d at 1075. The Court finds that the government has
19 met its burden of proof as to the amount of loss sustained by the victims and the Court finds by a
20 preponderance of the evidence that restitution should be ordered, jointly and severally, against
21 defendants.

22 **3. The victims are defined under the MVRA.**

23 Under the MVRA, a victim is (1) “a person” directly and proximately harmed as a
24 result of the commission of an offense for which restitution may be ordered; or (2) in the case of
25 an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any
26 person directly harmed by the defendants' conduct in the course of the scheme, conspiracy, or
27 pattern. 18 U.S.C. § 3663A(a)(2); see Lo, 839 F.3d at 788; Gossi, 608 F.3d at 579; Peterson, 538
28 F.3d at 1074; De La Fuente, 353 F. 3d at 771-772. Under the MVRA, the definition of a person

1 includes an entity. See Gossi, 608 F.3d at 576-579; De La Fuente, 353 F.3d at 769.

2 The Court finds the victims in this case were directly and proximately harmed
3 because Brandel's and Warras's offenses involved a scheme to commit wire fraud and securities
4 fraud and a conspiracy to commit a scheme of wire fraud and securities fraud. This Court finds
5 that whether the money came from a person or his or her corporation in this case, they were still
6 victims under the MVRA.

7 **4. Defendants' fraudulent statements are the causation of the victims' loss.**

8 Defendants' fraudulent statements caused the victims' loss. See Peterson, 538
9 F.3d at 1075. This is true even when the statements were not the sole factor in causing the
10 victims' loss. Id. (citing United States v. Spicer, 57 F.3d 1152, 1159 (D.C. Cir. 1995)); De la
11 Fuente, 353 F. 3d at 774-75; United States v. Hackett, 311 F.3d 989, 992-93 (9th Cir. 2002). It is
12 likely in this case that Defendants' fraud was the sole factor, but even if it was not, the victims
13 were unlikely to have invested their money had they known the true financial standing of the
14 "Malom Group". The Court finds the defendants made numerous fraudulent statements to the
15 victims in this case to further their scheme to commit wire fraud and securities fraud and their
16 conspiracy to commit a scheme of wire fraud and securities fraud. This Court finds Brandel's
17 and Warras's fraudulent statements were the causation of the victims' losses.

18 **5. Restitution includes victims' losses not included in counts of the indictment**
19 **where the defendants committed crimes that include a scheme, a conspiracy,**
20 **or a pattern, which are closely related to them.**

21 Where defendants are "convicted of crimes that require proof of a scheme,
22 conspiracy, or pattern of criminal activity . . . restitution may be ordered for all persons directly
23 harmed by the entire scheme. Such restitution is not limited to harm caused by the particular
24 counts of conviction. In this context, a restitution order may be based on related but uncharged
25 conduct that is part of a fraud scheme." In re Her Majesty the Queen in Right of Canada, 785
26 F.3d at 1276; see Lo, 839 F.3d at 788; Brock-Davis, 504 F.3d at 999; Grice, 319 F.3d at 1177-79.

27 The Court finds that since Brandel and Warras are guilty of a scheme to commit
28 wire fraud and securities fraud and a conspiracy to commit a scheme of such, the Court may

1 order restitution for all victims directly harmed by the entire scheme, including those not in
2 counts of conviction. This Court finds the government proved by preponderance of the evidence
3 the victims were directly harmed by the entire scheme and conspiracy in which Brandel and
4 Warras participated extensively and were convicted.

5 The harm to the victim must be closely related to the scheme or conspiracy, rather
6 than tangentially linked. See Riley, 143 F.3d at 1292. The Court finds the harm to the victims
7 who were not included in the indictment are closely related to defendants' scheme and
8 conspiracy with the victims who were in the indictment. The Court finds by a preponderance of
9 the evidence: (1) the victims in the guilt phase and the additional victims at sentencing are
10 victims as defined in the MVRA; (2) Anthony Brandel and James Warras caused the direct and
11 proximate harm to the victims; (3) under the scheme and conspiracy, Anthony Brandel and
12 James Warras caused the direct harm to the victims; (4) Anthony Brandel and James Warras
13 were the causation of the victims' losses through their fraudulent statements; and (5) Anthony
14 Brandel's and James Warras's crimes against the victims that were not in the indictment are
15 closely related to the conduct Anthony Brandel and James Warras committed against the victims
16 who were named in the indictment and finds by preponderance of the evidence that: (a) the joint
17 venture agreements with Malom Group AG or NAS were alike, (b) the escrow agreements were
18 alike, (c) the fraudulent bank statements were alike, (d) Anthony Brandel and James Warras
19 criminal conduct were alike, (e) the flow the victims' money from their accounts to escrow
20 accounts and from the escrow accounts to the same criminals, including Anthony Brandel and
21 James Warras, were alike, (f) Anthony Brandel's and James Warras's scheme and artifice to
22 defraud were alike, (g) Brandel's and Warras's conspiracy were alike, (h) Anthony Brandel's
23 and James Warras's criminal pattern were alike, (i) Anthony Brandel's and James Warras's
24 causation were alike, (j) Anthony Brandel's and James Warras's modus operandi were alike, (k)
25 Anthony Brandel's and James Warras's direct harm were alike, (k) Anthony Brandel's and
26 James Warras's direct and proximate harm were alike, (l) the time periods were alike, (m) the
27 removal of the money in escrow by distributing it to the defendants without approved financial
28 transactions were alike, and (n) Anthony Brandel's and James Warras's lulling the victims with

1 the fraudulent statements that the money would be returned were alike. See Admitted exhibits at
2 trial and at sentencing; testimony at trial and sentencing; see Lo, 839 F.3d at 788-789; Eyraud,
3 809 F.3d at 467 and 469; In re Her Majesty the Queen in Right of Canada, 785 F.3d at 1276;
4 Hymas, 780 F.3d at 1293 n.4; Hunter, 618 F.3d at 1064; Gossi, 608 F.3d at 578-79; Peterson,
5 538 F.3d at 1074-75; Brock-Davis, 504 F.3d at 999; United States v. Decoud, 456 F.3d 996,
6 1015 (9th Cir. 2006); De La Fuente, 353 F. 3d at 769; Grice, 319 F.3d at 1177-79; Hackett, 311
7 F.3d at 992-93; United States v. Montgomery, 150 F.3d 983, 999 (9th Cir. 1998); United States
8 v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978).

9 For these reasons, the Court finds the Government proved by preponderance of
10 the evidence the multiple links of the victims' money to the defendants is a causal chain, and no
11 intervening cause existed regarding the fraudulently obtained money from the victims to the
12 defendants. See Id.

13 “The government need not show direct contact or explicit agreement between the
14 defendants. It is sufficient to show that each defendant knew or had reason to know of the scope
15 of the conspiracy and that each defendant had reason to believe that his own benefits were
16 dependent on the success of the entire venture.” Montgomery, 150 F.3d at 999 (citation and
17 brackets omitted) (quoting Kostoff, 585 F.2d at 380). When the defendants' criminal activities
18 were “not limited to a single transaction”, and the defendants “played a variety of roles” in the
19 organization, they are liable for the entire conspiracy. See Decoud, 456 F.3d at 1015.

20 The Court finds the admitted evidence at trial and sentencing and the testimony at
21 trial and sentencing proved by preponderance of the evidence that Brandel and Warras were part
22 of the conspiracy and the scheme to defraud; knew the scope of the conspiracy and the scheme to
23 defraud; knew they were dependent on the success of the entire scheme and conspiracy to
24 receive their benefits, the proceeds of the fraudulently obtained money; were involved in
25 numerous transactions; and played a variety of roles in the conspiracy.

1 The Court finds, pursuant to 18 U.S.C. §§ 3663A and 3664, Brandel should pay
2 restitution of \$6,475,000 and Warras should pay restitution of \$6,475,000 to the victims, jointly
3 and severally liable with each other and with any other convicted codefendants.⁴

4 **III. FORFEITURE**

5 **A. The forfeiture statutes in the indictment authorize criminal forfeiture money** 6 **judgments.**

7 18 U.S.C. § 981(a)(1)(C) with 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p), the forfeiture
8 statutes alleged in the forfeiture allegation of the Indictment (#1), support criminal forfeiture
9 money judgments. See Newman, 659 F.3d at 1242; United States v. Casey, 444 F.3d 1071, 1076
10 (9th Cir. 2006); Phillips, 704 F.3d at 771; Fed. R. Crim. P. 32.2(b)(1); 28 U.S.C. § 2461(c); Fed.
11 R. Crim. P. 32.2(e); 21 U.S.C. § 853(p); Honeycutt, 137 S. Ct. at 1633-34; Lo, 839 F.3d at 780,
12 782-783, 790-792. The Court finds Defendants' crimes of which they were convicted have
13 forfeiture statutes that authorize criminal forfeiture money judgments.

14 **B. The illegal proceeds of defendants' scheme and conspiracy are the gross** 15 **proceeds.**

16 The Court finds illegal proceeds are total gross proceeds obtained, acquired, or possessed
17 with dominion and control in a scheme of fraud and a conspiracy to commit a scheme of such
18 fraud. See 18 U.S.C. § 981(a)(1)(C) with 28 U.S.C. § 2461(c); Honeycutt, 137 S. Ct. at 1632;
19 United States v. Christensen, 828 F.3d 763, 822-24 (9th Cir. 2016); Newman, 659 F.3d at 1243;
20 Casey, 444 F.3d at 1073-74, 1076; Lo, 839 F.3d at 792-794. The Court finds the gross proceeds
21 of this scheme to commit wire fraud and securities fraud and conspiracy to commit such scheme
22 are \$10,399,725. Admitted exhibits and testimony at trial and sentencing, including, but not
23 limited to, Ex. I, N.

24 The Government argued that the Court should order a criminal forfeiture money
25 judgment of \$4,920,000.00 based on an agreement between DOJ attorney Young and Mr. Smith,
26 Anthony Brandel's attorney. Anthony Brandel denied he authorized his counsel to make the deal

27
28 ⁴ The Court finds that there is no constitutional or statutory right to a jury determination on restitution or
restitution amounts. See Green, 722 F.3d 1146, 1151 (9th Cir. 2013); Dubose, 146 F.3d at 1148; 18 U.S.C. §§ 3663,
3663A, 3563(a)(2), (b)(2), 3583(d).

1 (ECF No. 371, p. 1-2). Based on Anthony Brandel's statement that he never authorized the deal,⁵
2 the Court finds Brandel obtained, acquired, and possessed with dominion and control \$8,849,725
3 of the fraudulently obtained illegal proceeds through Commercial Escrow Services ("CES") and
4 \$100,000 through MY Consultants as to B&CG. Exhibits N and K; admitted exhibits and
5 testimony at trial and sentencing. Brandel dictated to Toni Hardstone of CES when and to whom
6 the \$8,849,725 went before the Joint Venture Agreement authorized such and even without
7 signed escrow instructions. Exhibit N; admitted exhibits and testimony at trial and sentencing.
8 Brandel determined when and to whom the fraudulently obtained illegal proceeds went from MY
9 Consultants, including the \$100,000 through MY Consultants as to B&CG. Exhibits N, K, and
10 M; admitted exhibits and testimony at trial and sentencing.

11 The Court finds the government proved by a preponderance of the evidence per
12 Honeycutt that Brandel obtained, acquired, or possessed with dominion and control \$8,949,725
13 from the scheme to commit wire fraud and securities fraud and conspiracy to commit a scheme
14 of such fraud. However, the Court accepts the admission by the United States that they were
15 limited to seeking a criminal forfeiture money judgment of \$4,920,000.00. The Court orders
16 Brandel to pay a criminal forfeiture money judgment of \$4,920,000.00. Admitted exhibits and
17 testimony at trial and sentencing, including, but not limited to, Ex. J, K, M, N.

18 In the Preliminary Order of Forfeiture, the government moved and the Court ordered
19 Warras to pay a criminal forfeiture money judgment of \$4,920,000 pursuant to Fed. R. Crim. P.
20 32.2(b)(1) and (2); 18 U.S.C. § 981(a)(1)(C) with 28 U.S.C. § 2461(c); and 21 U.S.C. § 853(p).
21 However, the government then moved to lower Warras's criminal forfeiture money judgment to
22 \$876,750 to reflect the holding in Honeycutt.

23 The Court finds the government proved by preponderance of the evidence per Honeycutt
24 that Warras obtained, acquired, or possessed with dominion and control \$876,750 from the

25
26 ⁵ In Anthony Brandel's latest Motion to Adjust Restitution and Forfeiture (#371), he declared he did not
27 authorize his attorney, Mr. Smith, to obtain a better deal for Anthony Brandel regarding the criminal forfeiture money
28 judgment of \$4,920,000 (ECF No. 371, p. 1-2). To protect his rights, the government requested in its Response (ECF
No. 373) to order the criminal forfeiture money judgment of \$8,949,725. However, the Court had already ruled upon
forfeiture two weeks prior to Brandel's Motion to Adjust ordering forfeiture against Brandel in the amount of
\$4,920,000.00. Therefore, the Court finds that though the adduced evidence could support a criminal forfeiture money
judgment of \$8,494,725.00, the issue was moot before Brandel filed the Motion to Adjust.

1 scheme to commit wire fraud and securities fraud and conspiracy to commit such a scheme.
2 Admitted exhibits and testimony at trial and sentencing, including, but not limited to, Ex. J, K,
3 M, N. This Court orders Warras to pay a criminal forfeiture money judgment of \$876,750.⁶

4 **C. Ordering forfeiture and restitution does not violate the Double Jeopardy Clause**
5 **of the Fifth Amendment and does not create an improper double recovery.**

6 The Court finds ordering forfeiture and restitution at sentencing does not violate the
7 Double Jeopardy Clause of the Fifth Amendment. See Monge v. California, 524 U.S. 721, 728
8 (1998); Hudson v. United States, 522 U.S. 93, 98 (1997). The Double Jeopardy Clause “protects
9 only against the imposition of multiple *criminal* punishments for the same offense, and then only
10 when such occurs in successive proceedings.” Hudson, 522 U.S. at 99; see United States v.
11 Hickey, 367 F.3d 888, 892 (9th Cir. 2004), *opinion amended on denial of reh’g*, 400 F.3d. 658
12 (9th Cir. 2005).

13 The Court finds defendants’ argument that multiple financial penalties for the same crime
14 at sentencing violates double jeopardy is not supported by law. In every criminal case this Court
15 may or must, depending on the statutes, sentence the defendant with a fine, a special mandatory
16 assessment, the cost of imprisonment, the cost of residential re-entry center, the cost of
17 supervised release, restitution, and forfeiture (see, e.g., 18 U.S.C. §§ 982, 981 with 28 U.S.C. §
18 2461(c), 1963, 3013, 3554, 3556, 3571, 3572, 3574, 3611, 3663, 3663A, and 3664; U.S.S.G. §§
19 5E1.1, 5E1.2, and 5E1.2(d)(7); and 21 U.S.C. §§ 853 and 881 with 28 U.S.C. § 2461(c)) in
20 addition to imprisonment, supervised release, or probation). The Court finds double jeopardy is
21 not violated in this case because the Court orders restitution, the forfeiture, and the other
22 financial obligations at sentencing and no successive proceedings occur.

23 Restitution and forfeiture are separate and distinct, serving completely different purposes.
24 Restitution makes the victim whole again. See Newman, 659 F.3d at 1241-42; Hunter, 618 F.3d
25 at 1064; United States v. Davis, 706 F.3d 1081, 1082-84 (9th Cir. 2013). Davis rejected the

26
27 ⁶ The Court finds that no constitutional right exists for a jury determination of criminal forfeitures. See
28 Libretti v. United States, 516 U.S. 29, 49 (1994); Christensen, 828 F.3d at 821-22; Phillips, 704 F.3d at 769-71.
Additionally, the Court finds no statutory right exists for a jury to decide criminal forfeiture money judgments. See
Fed. R. Crim. P. 32.2(b)(1)(A) and (B), (b)(2)(A), and (b)(5)(A) and (B); Christensen, 828 F. 3d at 822; Phillips, 704
F.3d at 771; Newman, 659 F.3d at 1242 -43.

double recovery argument for forfeiture and restitution since they serve different purposes. See Id.; United States v. Boulware, 384 F.3d 794, 813 (9th Cir. 2004); United States v. Bright, 353 F.3d 1114, 1125 (9th Cir. 2004); United States v. Feldman, 853 F.2d 648, 663–64 (9th Cir. 1988). Similarly, the Second, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have rejected the argument that ordering forfeiture and restitution violates Double Jeopardy. See United States v. Peters, 732 F.3d 93, 100 (2d Cir. 2013); United States v. Kalish, 626 F.3d 165, 169 (2d Cir. 2010); United States v. Taylor, 582 F.3d 558, 565–66 (5th Cir. 2009); United States v. Corrado, 227 F.3d 543, 549-551 (6th Cir. 2000); United States v. Venturella, 585 F.3d 1013, 1019-20 (7th Cir. 2009), *cert. denied*, 559 U.S. 955 (2010).

IV. EIGHTH AMENDMENT

A. Under the Law-of-the-Circuit, *Bajakajian* does not undercut the theory, the reasoning, and the facts of the Ninth Circuit case law that holds illegal proceeds do not violate the Eighth Amendment, and *Bajakajian* is NOT clearly irreconcilable with them.

The law-of-the-circuit rule states, “a published decision of this court constitutes binding authority which ‘must be followed unless and until overruled by a body competent to do so.’ ” Gonzalez v. Arizona, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (quoting Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); see Hart, 266 F.3d at 1170-74; Ross Island Sand & Gravel v. Matson, 226 F.3d 1015, 1018 (9th Cir. 2000)). Exceptions exist to the law-of-the-circuit rule. Where a case of the United States Supreme Court “undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable, then a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled”. Gonzalez, 677 F.3d at 389 n.4 (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). Additionally, a high standard must be overcome to invoke this higher authority exception. Lair v. Bullock, 697 F.3d 1200, 1207 (9th Cir. 2012) (quoting United States v. Delgado-Ramos, 635 F.3d 1237, 1239 (9th Cir. 2011)).

This Court finds this higher authority exception to law-of-the-circuit does not apply because United States v. Bajakajian, 524 U.S. 321, 330 n.5 (1998) does not undercut the theory,

1 the reasoning, and the facts underlying United States v. Feldman, 853 F.2d 648 (9th Cir. 1988),
2 United States v. Real Property located at 22 Santa Barbara Drive, 264 F.3d 860 (9th Cir. 2001),
3 and United States v. Guillen-Cervantes, 566 F. App'x 576 (9th Cir. 2014), and Bajakajian is **not**
4 clearly irreconcilable with them. The Ninth Circuit three-judge panels in United States v. 3814
5 NW Thurman Street, 164 F.3d 1191 (9th Cir. 1999), United States v. Beecroft, 825 F.3d 991 (9th
6 Cir. 2016), *abrogated on other grounds*, Honeycutt, 137 S. Ct. at 1632 and 1635, and United
7 States v. Mosley, 652 F. App'x 511 (9th Cir. 2016) did not perform, and failed to meet, this high
8 standard to invoke this higher authority exception to the law-of-the-circuit to reject the three-
9 judge panel decisions of Feldman, 22 Santa Barbara, and Guillen-Cervantes that illegal proceeds
10 are not grossly disproportionate with Bajakajian's reasoning, theory, and facts.

11 First, Bajakajian did not “undercut the theory or reasoning underlying” Feldman, 22
12 Santa Barbara Drive, and Guillen-Cervantes and was **not** “clearly irreconcilable with” Feldman,
13 22 Santa Barbara, and Guillen-Cervantes. These cases decided illegal proceeds forfeitures where
14 Bajakajian decided a reporting violation forfeiture that was not an instrumentality, was not
15 facilitating property, was legal proceeds, and was a legal livelihood.

16 Second, the Bajakajian's facts, theory, and reasoning are very different than Feldman's,
17 22 Santa Barbara's, and Guillen-Cervantes's facts, theory, and reasoning regarding the Eighth
18 Amendment.

19 Third, it is “far from clear” that a reporting violation forfeiture, non-instrumentality, non-
20 facilitating property, legal proceeds, and a legal livelihood case, which is punishment under the
21 Eighth Amendment, would apply to an illegal proceeds case.

22 Fourth, illegal proceeds forfeitures are “not clearly punishment” since the defendants do
23 not own the property (see United States v. \$4,224,958.57, 392 F.3d 1002, 1004 (9th Cir. 2004);
24 Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989); United States v.
25 Hooper, 229 F.3d 818, 821 22 (9th Cir. 2000)). It is not the defendant's legal livelihood, it is not
26 the defendant's legal proceeds, it is not a facilitating property, and it is not an instrumentality.

27 Since the three-judge panels of Thurman, Beecroft, and Mosley did not perform this
28 required law of-the-circuit analysis on Feldman, 22 Santa Barbara, and Guillen-Cervantes, the

1 law-of-the-circuit higher authority exception does not apply to Feldman, 22 Santa Barbara, and
2 Guillen-Cervantes. See Hart, 266 F.3d at 1170-71; Green, 722 F.3d at 1149-51; Miller, 335 F.3d
3 at 893 and 899-900. Even if the three-judge panels had performed the law of-the-circuit analysis,
4 Bajakajian did not undercut the theory, reasoning, and facts underlying Feldman, 22 Santa
5 Barbara, and Guillen-Cervantes and was not clearly irreconcilable. See Green, 722 F.3d at 1149-
6 51; Miller, 335 F.3d at 893 and 899-900.

7 The law-of-the-circuit rule “binds all courts within a particular circuit, including the court
8 of appeals itself[]” unless overruled in an en banc review. See Hart, 266 F.3d at 1170-71
9 (brackets added). The three-judge panels failed to request en banc reviews as required by the
10 law-of-the-circuit. See Id. The cases of Feldman, 22 Santa Barbara, and Guillen-Cervantes are
11 not overturned and are valid binding precedent under the law-of-the-circuit. See Hart, 266 F.3d
12 at 1170-71. Thurman, Beecroft, and Mosley are not binding precedent under the law-of-the-
13 circuit. See Id.

14 This Court finds, under the law-of-the-circuit higher authority exception, Bajakajian does
15 not undercut the theory, the reasoning, and the facts underlying United States v. Feldman, 853
16 F.2d 648 (9th Cir. 1988), United States v. Real Property located at 22 Santa Barbara Drive, 264
17 F.3d 860 (9th Cir. 2001), and United States v. Guillen-Cervantes, 566 F. App’x 576 (9th Cir.
18 2014) and is **not** clearly irreconcilable with them. Feldman, 22 Santa Barbara, and Guillen-
19 Cervantes are the law-of-the-circuit cases and apply to this case.

20 **B. When the three-judge panels for Thurman, Beecroft, and Mosley**
21 **saw the clearly Irreconcilable Intracircuit Conflict with Feldman, 22**
22 **Santa Barbara, and Guillen-Cervantes, the three-judge panels were**
required to request an en banc review.

23 The intracircuit conflict rule states where a three-judge panel has a clearly irreconcilable
24 intracircuit conflict, the panel must request sua sponte an en banc review to decide the case,
25 unless the prior cases are distinguishable. The purposes of the intracircuit conflict rule are to
26 ensure conflicts are avoided, the majority of the circuit court judges control uniformity and
27 continuity of circuit decisions, judicial effective administration is achieved, finality of decisions
28 is promoted, and the circuit court will determine the future doctrinal trends of the circuit. See

1 Fed. R. App. P. 35(a); Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1478-79 (9th Cir.
2 1987) (en banc), *cert. denied*, 485 U.S. 989 (1988); Hart, 266 F.3d at 1179; Ross, 226 F.3d at
3 1018; United States v. Am.-Foreign S. S. Corp., 363 U.S. 685, 689-90 (1960); Textile Mills Sec.
4 Corp. v. C.I.R., 314 U.S. 326, 335 (1941). A three-judge panel cannot choose one of the
5 conflicting authorities. See Atonio, 810 F.2d at 1478.

6 Thurman, Beecroft, and Mosley are not distinguishable from Feldman, 22 Santa Barbara,
7 and Guillen-Cervantes because all were illegal proceeds cases where no ownership, no legitimate
8 income, no legal livelihood, no instrumentalities, no facilitating property, and no reporting
9 violation existed. The Thurman, Beecroft, and Mosley three-judge panels should have followed
10 Feldman, 22 Santa Barbara, and Guillen-Cervantes. When a three-judge panel is presented with a
11 clearly irreconcilable intracircuit conflict between Thurman, Beecroft, and Mosley and Feldman,
12 22 Santa Barbara, and Guillen-Cervantes concerning illegal proceeds, the three-judge panels
13 must request an en banc review. See United States v. Hardesty, 977 F.2d 1347, 1348 (9th Cir.
14 1992) (en banc); Antonio, 810 F.2d at 1478-79.

15 Thurman, Beecroft, and Mosley are clearly irreconcilable with Feldman, 22 Santa
16 Barbara, and Guillen-Cervantes for the reasons given in the previous paragraph. The intracircuit
17 conflict rule required the three-judge panels to request sua sponte an en banc review to resolve
18 the clearly irreconcilable intracircuit conflict of these cases. Since the three-judge panels in
19 Thurman, Beecroft, and Mosley did not request an en banc review as required under the
20 intracircuit conflict rule, Feldman, 22 Santa Barbara, and Guillen-Cervantes are not overturned
21 and are valid binding precedent. See Hart, 266 F.3d at 1170-71.

22 **C. The Eighth Amendment Excessive Fines Clause does not apply to Illegal Proceeds.**

23 The United States Supreme Court states, “Traditionally, forfeiture was an action against
24 the tainted property itself and thus proceeded *in rem* ...” “wholly unaffected by any criminal
25 proceeding *in personam*” Honeycutt, 137 S. Ct. at 1634-35 (citation and quotation marks
26 omitted) (quoting The Palmyra, 25 U.S. 1 (1827)). Eight of the States had an equivalent to the
27 Eighth Amendment in their Declarations of Rights or State Constitutions. See Browning-Ferris
28 Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). After the

1 constitutional and the State conventions adopted the United States Constitution, Congress and
2 the States adopted the Bill of Rights, including the Eighth Amendment. See Browning-Ferris,
3 492 U.S. at 264-267; Solem v. Helm, 463 U.S. 277, 285 n.10 (1983); Ingraham v. Wright, 430
4 U.S. 651, 664-66 (1977). The Eighth Amendment was based on the Art. I, § 9 of the Virginia
5 Declaration of Rights, adopting verbatim the language of the 1689 English Bill of Rights. Id.

6 The 1215 English Magna Carta addressed the excessive taking of legal proceeds, legal
7 property, legal livelihood, and owned property for crimes. The 1215 English Magna Carta did
8 not address illegal proceeds. See Bajakajian, 524 U.S. at 332; Calero-Toledo v. Pearson Yacht
9 Leasing Co., 416 U.S. 663, 682 (1974). The 1689 English Bill of Rights was passed to curb the
10 excessive takings by Kings, Queens, and their judges of legal proceeds, legal property, legal
11 livelihoods, and owned property, not illegal proceeds. See Browning-Ferris, 492 U.S. at 266 67;
12 Ingraham, 430 U.S. at 664-65 and n.33. Since the 1689 English Bill of Rights did not address
13 illegal proceeds, they are not excessive. Because the Eighth Amendment is based on the 1215
14 English Magna Carta, the 1689 English Bill of Rights, and the Virginia Declaration of Rights, it
15 does not address and does not apply to illegal proceeds, which are not the defendants'
16 instrumentalities, legal proceeds, legal property, legal livelihoods, facilitating property, and
17 owned property.

18 The United States Congress adopted only statutory in rem civil forfeitures, rejecting all
19 other types of forfeitures until 1970. See Austin v. United States, 509 U.S. 602, 611-12 (1993);
20 Calero-Toledo, 416 U.S. at 680-83; Bajakajian, 524 U.S. at 332 and n.7. The statutory civil
21 forfeitures forfeited facilitating property and instrumentalities, namely property used to violate
22 the law. See Austin, 509 U.S. at 612-15; Calero-Toldeo, 416 U.S. at 682; United States v. Parcel
23 of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson,
24 N.J., 507 U.S. 111, 121-23 (1993) (plurality). In 1970's, the United States Congress approved
25 criminal forfeitures for the first time. See Bajakajian, 524 U.S. at 332 n.7; 92 Buena Vista Ave.,
26 507 U.S. at 121-23. As time passed, Congress added more criminal forfeitures and provided in
27 2000 that the hundreds of civil forfeiture statutes could also be criminal forfeitures. See 28
28 U.S.C. § 2461(c); Newman, 659 F.3d at 1239.

1 In 1978, illegal drug proceeds became forfeitable. In 1984, illegal RICO proceeds
2 became forfeitable. In 1986, illegal proceeds became forfeitable for other crimes. See 92 Buena
3 Vista Ave., 507 U.S. at 121 n.16. In 1989, the reporting violation forfeitures came into existence
4 when the Supreme Court stated the funds were not an instrumentality, were not facilitating
5 property, and were not illegal proceeds. See Bajakajian, 524 U.S. at 329-334, 338, 340-343.
6 Illegal proceeds forfeitures are different than reporting violation forfeitures, instrumentality
7 forfeitures, and facilitating property forfeitures. Bajakajian, Austin, and Alexander did not focus
8 on civil forfeitures versus criminal forfeitures but focused on punishment. Austin and Alexander
9 focused on whether criminal and civil facilitating property was punishment. See Austin, 509 U.S.
10 at 604-05 (holding that a civil forfeiture of a mobile home and an auto body shop under the
11 facilitating forfeiture statutes, 21 U.S.C. § 881(a)(4) and (a)(7), is punishment and must be
12 analyzed under the Excessive Fines Clause); Alexander v. United States, 509 U.S. 544, 558-59
13 (1993) (holding the criminal forfeiture of defendant's entire business under the facilitating
14 forfeiture statute, 18 U.S.C. § 1963(a)(1), is punishment and must be analyzed under the
15 Excessive Fines Clause). The discussion in Austin and Alexander centers on the difference
16 between instrumentality and facilitating property forfeitures that were historically not
17 punishment versus the modern civil and criminal facilitating property forfeitures being
18 punishment due to the innocent owner defenses. "Thus, the question is not ... whether forfeiture
19 under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment." Austin,
20 509 U.S. at 610 (ellipsis added).

21 The Supreme Court in Austin and Alexander determined modern civil and criminal
22 facilitating forfeitures statutes are punishment, invoking the Eighth Amendment. 0Austin, 509
23 U.S. at 604 and 610-622; Alexander, 509 U.S. at 558-59. Austin and Alexander addressed
24 facilitating property, not illegal proceeds. Alexander did not address the millions of illegal
25 proceeds that were forfeited under 18 U.S.C. § 1963(a)(3). The lower courts found the millions
26 of illegal proceeds did not violate the Eighth Amendment. See United States v. Alexander, 32
27 F.3d 1231, 1236 (8th Cir. 1994); United States v. Alexander, 108 F.3d 853, 855 (8th Cir. 1997).
28 Additionally, the Supreme Court and the Ninth Circuit hold defendants do not own illegal

1 proceeds. See \$4,224,958.57, 392 F.3d at 1004; Caplin & Drysdale, Chartered, 491 U.S. at 626;
2 Hooper, 229 F.3d at 821-22. Since defendants cannot own illegal proceeds, the defendants'
3 Eighth Amendment rights are not violated when forfeiting illegal proceeds.

4 This Court finds the Ninth Circuit adopted the illegal proceeds grossly disproportionate
5 analysis in Feldman, 22 Santa Barbara, and Guillen-Cervantes and that since illegal proceeds are
6 not facilitating property, are not instrumentalities, are not a legal livelihood, are not legal
7 proceeds, are not owned, and are not a reporting violation, the government does not violate the
8 defendants' rights of the Excessive Fines Clause of the Eighth Amendment when forfeiting
9 illegal proceeds.

10 Both prior to and subsequent to the Bajakajian decision, like the Ninth Circuit, the
11 Second, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held illegal proceeds do not
12 violate the Eighth Amendment for the reasons given above. See United States v. Sum of
13 \$185,336.07 U.S. Currency Seized from Citizen's Bank Account L7N01967, 731 F.3d 189, 194
14 (2d Cir. 2013); United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), *reh'g denied*, 22 F.3d 1096
15 (5th Cir.), *cert. denied*, 513 U.S. 1015 (1994); United States v. Betancourt, 422 F.3d 240, 250-51
16 (5th Cir. 2005); United States v. Salinas, 65 F.3d 551, 554 (6th Cir. 1995); United States v.
17 Dusenberry, 223 F.3d 422, 425 (6th Cir. 2000), *aff'd*, 534 U.S. 161 (2002); Smith v. United
18 States, 76 F.3d 879, 882 (7th Cir. 1996); United States v. Funds on Deposit at Bank One Chicago
19 Account 1110010428312, 393 F. App'x. 391, 392 (7th Cir. 2010); Alexander, 32 F.3d at 1236;
20 Alexander, 108 F.3d at 855; United States v. \$63,530, 781 F.3d 949, 957 (8th Cir. 2015); United
21 Staets v. One Parcel of Real Property Described as Lot 41, Berryhill Farm Estates, 128 F.3d
22 1386, 1395 (10th Cir. 1997); United States v. \$189,825.00, 216 F.3d 1089, 7 (10th Cir. 2000)
23 (Table).

24 This Court finds United States v. Bajakajian, 524 U.S. 321 (1998) does not apply to the
25 facts of this case because the forfeitable amounts are illegal proceeds of frauds and conspiracy to
26 commit such frauds and are not legal income or property, are not legal livelihood, are not
27 facilitating property, are not instrumentalities, are not owned by the defendants, and are not
28 subject to a reporting violation and finds the forfeiture of \$4,920,000.00 as to Brandel and

1 \$876,750 as to Warras does not violate the Excessive Fines Clause of the Eighth Amendment
2 because it is illegal proceeds.

3 **D. The Bajakajian Analysis shows the forfeitures are not grossly disproportionate.**

4 The defendants must make a prima facie showing of an Eighth Amendment violation. See
5 Feldman, 853 F.2d at 663; United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987); United
6 States v. Ladum, 141 F.3d 1328, 1349 (9th Cir. 1998); Newman, 659 F.3d at 1241 n.4. This
7 Court finds the defendants failed to make any showing of an Eighth Amendment violation.
8 Bajakajian held a reporting violation forfeiture was punishment. See Id. at 327-28 (citing Austin,
9 509 U.S. at 609-10 and 619). Bajakajian adopted the Cruel and Unusual Punishments Clause
10 grossly disproportionate analysis for the Excessive Fines Clause for reporting violation
11 forfeitures. See Id. at 334-340 (citing Solem, 463 U.S. at 288; Rummel v. Estelle, 445 U.S. 263,
12 271 (1980)).

13 Based on the four factors of the Bajakajian grossly disproportionate analysis applied to
14 these facts, this Court finds Defendants' forfeiture orders are not grossly disproportionate to the
15 gravity of the crimes and do not violate the Excessive Fines Clause of the Eighth Amendment.
16 This Court finds the defendants committed wire fraud, securities fraud, and conspiracy to
17 commit such fraud for approximately four years, obtaining approximately \$10,399,725 of illegal
18 proceeds. The criminal activities were related to one another, and they committed money
19 laundering to use the illegal proceeds for their personal use. The defendants "fit into the class of
20 persons for whom the [forfeiture] statute was principally designed:" those who commit wire
21 fraud, securities fraud, and conspiracy to commit such fraud and money laundering the illegal
22 proceeds from those crimes. See Bajakajian, 524 U.S. at 338; United States v. Mackby, 339 F.3d
23 1013, 1017 (9th Cir. 2003). The defendants' crimes were extensive and grave. See Bajakajian,
24 524 U.S. at 336, 338-39.

25 Defendants' crimes caused many people excessive harm and damage: loss of dignity, loss
26 of self-respect, loss of jobs, houses, and businesses, not only for the victims that were defrauded
27 but also the families' members and companies' employees who lost their jobs because of the
28 fraud. The United States also had "loss to the public fisc[]" Bajakajian, 524 U.S. at 339. Instead

1 of the money going to companies to expand, to add employees, and to grow the economy, which
2 would have increased taxes for the government, the defendants used the illegal proceeds for
3 greedy purposes of spending them on themselves and failing to pay taxes on the fraudulently
4 obtained illegal proceeds.

5 **E. Application of the Bajakajian analysis to Warras concerning the Excessive Fines**
6 **Clause**

7 **1. Congressional Imprisonment.**

8 If the Court applied the congressional maximum imprisonment term for Warras,
9 the term could be 245 years consecutively. See 18 U.S.C. §§ 371, 1343; 15 U.S.C. §§ 78j(b),
10 78ff; Presentence Investigation Report (“PSR”), p. 1, 19. If the Court were to group each type of
11 crime for the congressional maximum imprisonment term, Warras could be sentenced to 45 years
12 consecutively. The congressional maximum imprisonment shows the serious gravity of Warras’s
13 crimes.

14 **2. U.S. Sentencing Guidelines Imprisonment.**

15 If the Court applied the U.S. Sentencing Guidelines maximum imprisonment term
16 for Warras, the term could be 108 months. PSR p.7-8, 19; U.S.S.G. §§ 3D1.2(d), 2B1.1(a)(1),
17 2B1.1(b)(1)(J), 2B1.1(b)(2)(A), 2B1.1(b)(9)(B), 2B1.1(b)(10)(C), 3C1.1, 5A. The U.S.
18 sentencing guidelines maximum imprisonment shows the serious gravity of Warras’s crimes.

19 **3. Congressional Fines.**

20 If the Court applied the congressional maximum fine consecutively to Warras, it
21 could be a total of \$71,598,900: \$20,799,450 for the Conspiracy, \$20,799,450 for the Wire
22 Fraud, and \$30,000,000 for the Security Fraud. PSR, p. 1, 19; 15 U.S.C. §§ 78j(b) and 78ff; 18
23 U.S.C. §§ 371, 1343, 3571, 3571(b)(1), 3571(b)(2), 3571(b)(3), 3571(b)(1)-(7), 3571(d); United
24 States v. W. Coast Aluminum Heat Treating Co., 265 F.3d 986, 988, 990 (9th Cir. 2001). The
25 congressional maximum fines show the serious gravity of Warras’s crimes.

26 **4. U.S. Sentencing Guidelines Fines.**

27 If the Court applied the U.S. Sentencing Guidelines maximum fine for Warras, it
28 could be \$30,000,000. U.S.S.G. §§ 5E1.2(c)(2), 5E1.2(c)(3), and 5E1.2(c)(4); 18 U.S.C. §

1 3571(b)(1), b(2) and (d); 15 U.S.C. §§ 78j(b) and 78ff; PSR, p.19; United States v. Grossi, 359 F.
2 App'x 830, 832 (9th Cir. 2009). The U.S. sentencing guidelines maximum fines show the serious
3 gravity of Warras's crimes.

4 **F. Application of the *Bajakajian* analysis to Brandel concerning the Excessive Fines**
5 **Clause**

6 **1. Congressional Imprisonment.**

7 If the Court applied the congressional maximum imprisonment term for Brandel,
8 the term could be 345 years consecutively. 15 U.S.C. §§ 78j(b), 78ff; 18 U.S.C. §§ 371, 1343;
9 PSR, p. 1-2, 15, 20. If the Court were to group each type of crime for the congressional
10 maximum imprisonment term, Brandel could be sentenced to 45 years consecutively. The
11 Congressional imprisonment maximum shows the serious gravity of Brandel's crimes.

12 **2. U.S. Sentencing Guidelines Imprisonment.**

13 If the Court applied the U.S. Sentencing Guidelines maximum term of
14 imprisonment for Brandel, the term could be 108 months. 18 U.S.C. § 371; PSR p. 1, 8, 15, 20;
15 U.S.S.G. §§ 3D1.2(d), 2B1.1(a)(1), 2B1.1(b)(1)(J), 2B1.1(b)(2)(A), and 2B1.1(b)(10)(C), 5A.
16 The U.S.S.G. imprisonment maximum shows the serious gravity of Brandel's crimes.

17 **3. Congressional Fines.**

18 If the Court applied the Congressional maximum fine consecutively to Brandel, it
19 could be a total of \$81,598,900: \$20,799,450 for the Conspiracy, \$20,799,450 for the Wire
20 Fraud, and \$40,000,000 for the Security Fraud. 15 U.S.C. §§ 78j(b) and 78ff; 18 U.S.C. §§ 371,
21 1343, 3571(b)(1); 3571(b)(2), 3571(b)(3), 3571(b)(1)-(7), 3571(d); W. Coast Aluminum, 265
22 F.3d at 988 and 990; PSR, p. 1, 12, 16, 20. The Congressional maximum fines show the serious
23 gravity of Brandel's crimes.

24 **4. U.S. Sentencing Guidelines Fines show the Serious Gravity of Brandel's**
25 **crimes.**

26 If the Court applied the U.S. Sentencing Guidelines maximum fine for Brandel, it
27 could be \$45,000,000. U.S.S.G. §§ 5E1.2(c)(2), 5E1.2(c)(3), 5E1.2(c)(4); 15 U.S.C. §§ 78j(b)
28 and 78ff; 18 U.S.C. § 3571(b)(1), 3571(b)(2) and (d); PSR, p.19; Grossi, 359 F. App'x at 832.

1 The U.S.S.G. maximum fines show the serious gravity of Brandel's crimes.

2 Since Warras's forfeiture of \$876,750 and Brandel's forfeiture of \$4,920,000.00
3 are much less than the fines this Court could have ordered them to pay, their criminal forfeiture
4 money judgments do not violate the Eighth Amendment and are presumptively constitutional.
5 *Grossi*, 359 F. App'x at 832; United States v. 817 N.E. 29th Drive, Wilton Manors, Florida, 175
6 F.3d 1304, 1309 (11th Cir. 1999); United States v. Dieter, 198 F.3d 1284 (11th Cir. 1999);
7 United States v. Moyer, 313 F.3d 1082 (8th Cir. 2002); United States v. Wallace, 389 F.3d 483,
8 486 (5th Cir. 2004); United States v. Bernitt, 392 F.3d 873, 880-81 (7th Cir. 2004); United States
9 v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005); United States v. Elfgeeh, 515 F.3d 100, 139 (2d
10 Cir. 2008).

11 When applying the Bajakajian gross disproportionality analysis, the amount that
12 can be forfeited is a multiple of the maximum amount of the fine. United States v. \$100,348, 354
13 F.3d 1110, 1122-24 (9th Cir. 2004) (inferring two times the U.S. Sentencing Guidelines
14 maximum fine of \$5,000); Mackby, 339 F.3d at 1015, 1017 (a multiple of more than 12.5 times
15 the amount of the loss); United States v. \$132,245 in U.S. Currency, 764 F.3d 1055, 1060 (9th
16 Cir. 2014) (explaining that "forfeiture does not per se violate the Eighth Amendment simply
17 because the amount to be forfeited exceeds the maximum fine under the Sentencing
18 Guidelines."); United States v. Riedl, 82 F. App'x 538 (9th Cir. 2003) (In a drug and money
19 laundering case, the Ninth Circuit found a forfeiture order that was 12 to 13 times the maximum
20 sentencing guideline fine was not excessive.).

21 Since the forfeiture amounts can be a multiple of the fines, this Court finds the
22 defendants' criminal forfeiture money judgments do not violate the Excessive Fines Clause
23 under Bajakajian.

24 **G. Warras's total punishment does not violate the Eighth Amendment.**

25 Since restitution is not punishment (Davis, 706 F.3d at 1084; Newman, 659 F.3d at 1241;
26 Hunter, 618 F.3d at 1064), the district court ordering the payment of restitution does not violate
27 the Excessive Fines Clause or Cruel and Unusual Punishments Clause of the Eighth Amendment
28 because it is already inherently proportional and is inherently linked to the offender's culpability.

1 Beecroft, 825 F.3d at 997, *abrogated on other grounds*, Honeycutt, 137 S. Ct. at 1632 and 1635;
2 Dubose, 146 F.3d at 1147.

3 The Court finds Warras's total punishment, including the forfeiture and the restitution, is
4 not grossly disproportionate and does not violate the Excessive Fines Clause or the Cruel and
5 Unusual Punishments Clause of the Eighth Amendment. This Court finds Warras's total
6 punishment versus his actual punishment are the following:

7	Congressional Maximum Imprisonment:	245 years
8	U.S.S.G. Maximum Imprisonment:	108 months
9	Actual Imprisonment:	87 months to run concurrently with 60 months
10		
11	Congressional Maximum Fine:	\$51,400,000
12	U.S.S.G. Maximum Fine:	\$30,000,000
13	Actual Fine:	\$0
14	Special Assessment	\$1,300
15	Forfeiture	\$876,750
16	Restitution	\$6,475,000
17	Statutory Maximum Supervised Release	Up to 3 years: PSR, p. 19
18		
19	U.S.S.G. Maximum Supervised Release	3 years: PSR, p. 20, ¶133
20	Actual Supervised Release	3 years concurrent

21 This Court finds Warras's 87-month sentence is well within the statutory 345 years
22 sentence and is less than the Guideline 108 month sentence. This Court did not order a fine as
23 part of his sentence though the statutory maximum fine was \$71,598,900 and the Guideline
24 maximum fine was \$30,000,000. Warras's fraud with his coconspirators caused \$10,399,725
25 damages (Ex. I, N). When this Court ordered restitution of \$6,475,000 jointly and severally
26 liable as to the defendants and the forfeiture order of \$876,750, based on the fine of \$71,598,900
27 or \$30,000,000 that was not ordered, the restitution amount and the forfeiture amount combined
28 is less than the fine. The restitution which is not punishment and the forfeiture added together

1 totals \$7,351,750. When that amount is divided by the Congressional fine of \$71,598,900
2 (\$7,351,750/\$71,598,900 = .103), the amount is less than 11% of the fine. When the \$7,351,750
3 is divided by the U.S.S.G. fine of \$30,000,000 (\$7,351,750/\$30,000,000 = .245), the amount is
4 about 25% of the fine.

5 Since Warras's total punishment is much less than what this Court could have sentenced
6 him, his total punishment is not grossly disproportionate and does not violate the Excessive Fines
7 Clause or the Cruel and Unusual Punishments Clause of the Eighth Amendment. Feldman, 853
8 F.2d at 664; Busher, 817 F.2d 1409.

9 **H. Brandel's total punishment does not violate the Eighth Amendment.**

10 Since restitution is not punishment (Davis, 706 F.3d at 1084; Newman, 659 F.3d at 1241;
11 Hunter, 618 F.3d at 1064), the district court ordering the payment of restitution does not violate
12 the Excessive Fines Clause or Cruel and Unusual Punishments Clause of the Eight Amendment
13 because it is already inherently proportional and is inherently linked to the offender's culpability.
14 Beecroft, 825 F.3d at 997, *abrogated on other grounds*, Honeycutt, 137 S. Ct. at 1632 and 1635;
15 Dubose, 146 F.3d at 1147.

16 This Court finds Brandel's total punishment, including the forfeiture and the restitution,
17 is not grossly disproportionate and does not violate the Excessive Fines Clause or the Cruel and
18 Unusual Punishments Clause of the Eighth Amendment. This Court finds Brandel's total
19 punishment versus his actual punishment are the following.

21	Congressional Maximum Imprisonment:	345 years
22	U.S.S.G. Maximum Imprisonment:	108 months
23	Actual Imprisonment:	87 months to run concurrently with 60 months
24	Congressional Maximum Fine:	\$81,598,900
25	U.S.S.G. Maximum Fine:	\$45,000,000
26	Actual Fine:	\$0
27	Special Assessment:	\$1,800: 18 U.S.C. § 3013
28	Forfeiture:	\$4,920,000

Restitution:	\$6,475,000, Exhibit I
Congressional Maximum Supervised Release Up to 3 years:	PSR, p. 19
U.S.S.G. Maximum Supervised Release	3 years: PSR, p. 20, ¶133
Actual Supervised Release	3 years concurrent

This Court finds Brandel’s 87-month sentence is well within the statutory 345 years sentence and is less than the U.S.S.G. 108 month sentence. This Court did not order Brandel to pay a fine as part of his sentence though it could have been a Congressional maximum fine of \$81,598,900 or U.S.S.G. maximum fine of \$45,000,000. Brandel’s fraud with his coconspirators caused \$10,399,725 damages (Ex I, N). When this Court ordered restitution of \$6,475,000 jointly and severally liable as to the defendants and the forfeiture order \$4,920,000 as to Brandel, based on the fine of \$81,598,900 or \$45,000,000 that was not ordered, the restitution amount and the forfeiture amount combined is less than the fine. The restitution which is not punishment and the forfeiture added together totals \$11,395,000.00. Since Brandel’s total punishment is much less than to what this Court could have sentenced him, Brandel’s total punishment is not grossly disproportionate and does not violate the Excessive Fines Clause or the Cruel and Unusual Punishments Clause of the Eighth Amendment. Feldman, 853 F.2d at 664.

V. SUMMARY

Accordingly, IT IS HEREBY ORDERED that the Government's Motions for Forfeiture and Restitution (#296/297/298/374) are **GRANTED per this order and the Minute Order (#368)**;

IT IS FURTHER ORDERED that the Government's Motion to Strike (#366) is **GRANTED**:

IT IS FURTHER ORDERED that Defendant Brandel's Motion to Adjust Restitution and Forfeiture (#371) is **DENIED**;

IT IS FURTHER ORDERED that the Government's Motion to Add GW's \$100,000 to Restitution (#372) is **GRANTED**;

IT IS FURTHER ORDERED that the Government's Motion to Strike (#382) is **DENIED**:

1 IT IS FINALLY ORDERED that the Amended Judgment (#413) is **VACATED** as
2 **improvidently entered as no Judgment had been entered, awaiting the present opinion and**
3 **order on restitution and the final order of forfeiture.**⁷

4 **VI. CONCLUSION**

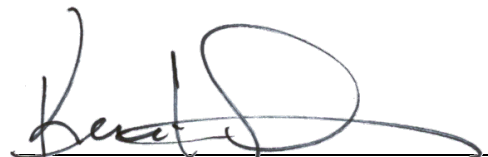
5 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Anthony
6 Brandel and James Warras pay restitution of \$6,475,000.00 jointly and severally liable along
7 with the other defendants convicted in this case;

8 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States
9 recover from James Warras the in personam criminal forfeiture money judgment of \$876,750.00
10 pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); 18 U.S.C. § 981(a)(1)(C) with 28 U.S.C. §
11 2461(c); and 21 U.S.C. § 853(p).

12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the United States
13 recover from Anthony Brandel the in personam criminal forfeiture money judgment of
14 \$4,920,000.00 pursuant to Fed. R. Crim. P. 32.2(b)(4)(A) and (B); 18 U.S.C. § 981(a)(1)(C) with
15 28 U.S.C. § 2461(c); and 21 U.S.C. § 853(p).

16 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Clerk send copies
17 of this Order to all counsel of record and three certified copies to the United States Attorney's
18 Office, Attention Asset Forfeiture Unit.

19 DATED: May 13, 2019.

20
21
22
23 

24 KENT J. DAWSON
UNITED STATES DISTRICT JUDGE

25
26 ⁷ The parties agree that Defendants must be present per Federal Rule of Criminal Procedure 43 at sentencing.
27 Accordingly, the Court will set a date and time for oral pronouncement of the order on restitution and final order of
28 forfeiture. However, sentencing having been heard and the issue of restitution more than fully briefed, no further
argument will be considered by the Court. Should either Defendant wish to sign a written waiver of appearance per
Rule 43(c)(2), final judgment will be entered forthwith with the understanding, that unless withdrawn, Defendant
Brandel will first receive a hearing on his motion to represent himself.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	2:13-CR-439-KJD-(VCF)
)	
Plaintiff,)	Restitution Victims and the Amount owed
)	Each Victim
v.)	
)	
ANTHONY BRANDEL and)	
JAMES WARRAS,)	
)	
Defendants.)	

Anthony Brandel and James Warras restitution payments will go to these victims for these

losses:

VICTIMS	LOSS AMOUNT
GL	\$ 225,000
N&NA	\$ 350,000
JS	\$ 300,000
JH	\$ 150,000
EK	\$ 430,000
MB	\$ 250,000
GD	\$ 200,000
MK	\$ 200,000
TF	\$1,000,000
JA	\$ 540,000
WB	\$ 330,000
LB	\$ 300,000
DM	\$ 400,000
GW	\$ 100,000
JE	\$ 500,000
<u>W&CG</u>	<u>\$1,200,000</u>
Total	\$6,475,000